

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DIANA M.K. WEEKS and DEPARTMENT OF DEFENSE,  
BARSTOW COMMISSARY, Barstow, CA

*Docket No. 98-983; Submitted on the Record;  
Issued December 10, 1999*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective February 9, 1996 on the grounds that she refused an offer of suitable work.

On July 26, 1994 appellant, then a 37-year-old temporary warehouse store worker, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she injured her left arm and wrist on July 23, 1994 when a box of boxes she was loading slipped and fell on her arm. The Office accepted appellant's claim for left wrist contusion and strain and left shoulder condition. Appellant returned to light duty, but was terminated by the employing establishment effective August 6, 1994 as appellant had reached the expiration of her temporary appointment.

On June 14, 1995 the employing establishment made a formal job offer to appellant for a store worker with a temporary appointment of 120 days. They requested that appellant indicate, on the attached form, acceptance or declination of their offer no later than June 23, 1995. The employing establishment noted that the duties of the temporary position involved light lifting of 10 pounds or less, sitting for an extended period of time and limited standing. The employing establishment indicated that if appellant's physician believed that any of the restrictions were inappropriate, that the job duties would be modified according to his recommendations.

In a note dated July 5, 1995, Dr. Rama T. Pathi, appellant's attending Board-certified orthopedic and hand surgeon, indicated that he had reviewed the job offer and appellant was capable of performing the position.

In a July 18, 1995 letter, appellant declined the offered position as she was on medication which made her lethargic and sleepy. Appellant also indicated that she was neither physically nor mentally able to return to work.

By letter dated September 7, 1995, the Office advised appellant that the offer of employment was reviewed and found suitable. Appellant was advised of the provisions of 5 U.S.C. § 8106(c) which provides that a partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for her, is not entitled to compensation. Appellant was allowed thirty (30) days to accept the job offer or to provide an explanation for her refusal.

Appellant indicated on a Form CA-8 that she declined the job because of her injury on September 11, 1995 claim for continuing compensation.

By report dated October 30, 1995, Dr. Pathi, noted that appellant had subjective complaints of pain and an inability to raise her shoulder as well as tingling and numbness in her left hand. He opined that appellant could perform light duty provided she “avoid repetitive overhead lifting above the shoulder” and climbing motion and repetitive twisting.

By decision February 9, 1996, the Office terminated appellant’s compensation benefits on the grounds that appellant had refused suitable work.

In a report dated March 22, 1996, Dr. Pathi noted that appellant continued to have pain in her left shoulder and wrist. He reiterated that appellant could return to light-duty work if she avoided repetitive use of her left upper extremity.

Dr. Pathi, in a May 17, 1996 report, indicated that appellant’s psychiatrist had kept her off work. He again opined that appellant could perform modified light-duty work.

In a report dated October 11, 1996, Dr. Pathi opined that appellant was capable of performing a desk job and should avoid overhead activities.

On January 15, 1997 appellant requested reconsideration by fax.

In a report dated November 13, 1996, received by the Office on January 21, 1997, Dr. Pathi again opined that appellant was capable of returning to light-duty work.

The Office denied appellant’s application for modification on the basis that the evidence submitted was insufficient in a decision dated January 29, 1997.<sup>1</sup> The Office noted that Dr. Pathi indicated that appellant was capable of performing modified light-duty work.

The Board finds that the Office properly terminated appellant’s compensation effective February 9, 1996 on the grounds that she refused an offer of suitable work

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates

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<sup>1</sup> Following the date of appellant’s appeal which was received by the Board on February 3, 1998 with a postmark date of January 29, 1996, the Office issued a subsequent nonmerit decision on March 6, 1998. The Board finds the March 6, 1998 Office decision to be null and void. The Board has held that the Office does not have jurisdiction to issue a decision while the case is pending before the Board on the same issue; see *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.<sup>2</sup> The Office has met its burden in the present case.<sup>3</sup>

Under section 8106(c)(2) of the Federal Employees' Compensation Act,<sup>4</sup> the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.<sup>5</sup> Section 10.124(c) of Title 20 of the Code of Federal Regulations<sup>6</sup> provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.<sup>7</sup> To justify termination, the Office must show that the work offered was suitable<sup>8</sup> and must inform appellant of the consequences of refusal to accept such employment.<sup>9</sup>

In the present case, the Office has properly exercised its authority granted under the Act and the implementing federal regulations. In the instant case, appellant's treating physician indicated that appellant was capable of performing the modified job offered by the employing establishment. The evidence submitted by appellant does not show that position requirements were not within her restrictions. Dr. Pathi, appellant's treating physician, has opined in reports that appellant was able to return to work provided it was within her restrictions of no repetitive lifting over the shoulder. In his May 17, 1996 report, he noted that appellant's psychiatrist had kept her off work, but that physically she could perform the job offered. The record contains no evidence that appellant could not perform the modified job offered due to her accepted employment injury. Thus, the Office properly terminated her compensation benefits effective February 9, 1996 due to her refusal to accept a suitable job offer.

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<sup>2</sup> *Shirley B. Livingston*, 42 ECAB 855, 860 (1991).

<sup>3</sup> Appellant, nonetheless, remains entitled to payment of medical expenses incurred for the treatment of her accepted conditions.

<sup>4</sup> 5 U.S.C. § 8106(c)(2).

<sup>5</sup> *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

<sup>6</sup> 20 C.F.R. § 10.124(c).

<sup>7</sup> *Camillo R. DeArcangelis*, *supra* note 5; *see* 20 C.F.R. § 10.124(e).

<sup>8</sup> *See Carl W. Putzier*, 37 ECAB 691, 700 (1986); *Herbert R. Oldham*, 35 ECAB 339, 346 (1983).

<sup>9</sup> *Kathy M. Webb*, 36 ECAB 242, 244 (1984); *see* Federal (FECA) Procedure Manual, Part -- 2 Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.813.8(c)(7) (June 1993).

The decision of the Office of Workers' Compensation Programs dated January 29, 1997 is affirmed.

Dated, Washington, D.C.  
December 10, 1999

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member